The Attorney General of Texas

October 15, 1980

MARK WHITE
Attorney General

Supreme Court Building
P.O. Box 12548
Austin, TX. 78711
512/475-2501

1607 Main St., Suite 1400
Dallas, TX. 75201
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905
915/533-3484

1220 Dallas Ave., Suite 202
Houston, TX. 77002
713/650-0666

806 Broadway, Suite 312
Lubbock, TX. 79401
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

Mr. Ted P. MacMaster
North Central Texas Council
of Governments
602 Turtle Creek Tower
3131 Turtle Creek Boulevard
Dallas, Texas 75219

Open Records Decision No. 255

Re: Whether proposals submitted by consultant seeking a contract with governmental body are available to public under Texas Open Records Act

Dear Mr. MacMaster:

Earlier this year, the City Transit System of Fort Worth decided to hire a marketing research consultant to assess the effectiveness of its marketing strategy and the level of public awareness of its services. It solicited proposals for a study of its strengths and weaknesses in these areas. One of the consultants who submitted proposals now seeks copies of the proposals submitted by his competitors. Pursuant to section 7 of article 6252-17a, V.T.C.S., you have asked us to decide whether this material must be released. You contend that these proposals may be withheld under sections 3(a)(1), 3(a)(4), and 3(a)(10) of article 6252-17a.

Section 3(a) of article 6252-17a provides that information collected and maintained by governmental bodies is public information with the following pertinent exceptions:

> (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;. . .
>
> (4) information which, if released, would give advantage to competitors or bidders;. . .
>
> (10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision;. . .

You state that these proposals contain unique research methods and approaches, and that their release would afford the requestor a competitive advantage in future bidding situations. You also claim that the material

qualifies as trade secrets. For the following reasons, however, we conclude that the information in these proposals is, with one exception, not protected from disclosure.

A "trade secret" is:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

Hyde Corp. v. Huffines, 314 S.W. 2d 763 (Tex. 1958). See also Open Records Decision Nos. 232 (1979); 217 (1978); 175 (1977). There are six criteria for determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside the company's business; (2) the extent to which it is known by employees and others involved in the company's business; (3) the extent of measures taken by the company to guard the secrecy of its information; (4) the value of the information to the company and to its competitors; (5) the amount of effort or money expended by the company in developing this information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757, Comment b (1939). See also Open Records Decision Nos. 232, 175, supra.

We do not think the information in these proposals qualifies as trade secrets when assessed in light of these criteria. First, none of the consultants submitted briefs setting forth reasons why their proposals should be withheld from disclosure or indicating any efforts taken to ensure the confidentiality of the information contained therein. In Open Records Decision No. 175, this office concluded that part of a proposal submitted by Electronic Data Systems qualified as a trade secret; the opinion noted that EDS had made consistent efforts to keep the information confidential. In Open Records Decision Nos. 198 and 184 (1978), however, this office decided that information did not qualify for the 3(a)(10) exception, largely because the businesses failed to indicate what efforts, if any, had been made to keep the information confidential. See also Rimes v. Club Corp. of America, 542 S.W. 2d 909 (Tex. Civ. App. - Dallas 1976, writ ref'd n.r.e.); Open Records Decision Nos. 232 (1979); 217 (1978); 89 (1975).

Second, there is nothing to indicate that the research techniques discussed in the proposals are not generally known throughout the industry. Matters of general knowledge in an industry cannot be appropriated as a trade secret. Wissman v. Boucher, 240 S.W. 2d 278 (Tex. 1951). We have examined each proposal carefully and conclude that, aside from differences in approach and format, each company utilizes the same basic techniques.

Finally, we are unaware of any judicial decision holding that this type of information qualifies as a trade secret. In Open Records Decision No. 184, supra, this office concluded that a plan of operation filed with the Department of Human Resources as an attachment to a contract was public information. The plan consisted of a:

> description of available services and the procedures used to implement them, a listing of program goals, objectives and performance indicators, and a delineation of cost estimates, reporting and evaluation.

The opinion concluded that no court had held that this type of information qualifies as a trade secret. Because we think the information in these proposals is essentially the same as the material involved in Open Records Decision No. 184, we conclude that it is also not protected by judicial decision.

For these reasons, we conclude that the information in these proposals is not protected from disclosure by section 3(a)(10).

You suggest that lists of customers may be withheld. We agree. In Open Records Decision No. 107 (1975), this office held that the legislative history of the Federal Freedom of Information Act, after which section 3(a)(10) was patterned, indicates that information pertaining to business sales, statistics, inventories, customer lists, etc., was intended to be exempt from public disclosure. Accordingly, we conclude that lists of customers included in these proposals may be withheld.

In discussing the application of section 3(a)(10), we noted that we are unaware of any judicial decision which would make this information confidential, similarly, we are unaware of any such constitutional provision or statute. Thus, we conclude that the material is not exempt from disclosure under section 3(a)(10).

We finally consider the application of section 3(a)(4). This exemption is not applicable when bidding on a particular contract has been completed and the contract is in effect. Open Records Decision No. 184, supra. In this instance, we understand that the bidding on this project has been completed and that a contract has been awarded; thus, we conclude that section 3(a)(4) does not apply. See also Open Records Decision No. 109 (1975).

Very truly yours,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General